Supreme Court, U.S.
FILED
OCT 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-807

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF OHIO,
Petitioner,

vs.

AKRON AIRPORT POST NO. 8975;
VETERANS OF FOREIGN WARS OF
THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED

Where an Inspection of a Liquor Permit Premises is Made Pursuant to State Regulation but by Officers Other than those Specified by Statute, No Reasonable Expectation of Privacy is Violated Mandating Exclusion of Evidence Under the Fourth Amendment.

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To the Supreme Court of Ohio

OPINIONS BELOW

The decision of the Supreme Court of the State of Ohio reversing the Ninth District Court of Appeals decision is reproduced in the Appendix of the Petition at page A1.

The decision of the Court of Appeals for the Ninth District reversing the judgment of the trial court of Akron is reproduced in the Appendix of the Petition at page A12.

The decision of Akron Municipal Court suppressing the evidence is reproduced in the Appendix of the Petition at page A19.

JURISDICTIONAL STATEMENT

Petitioner respectfully requests this Court to invoke

jurisdiction under 28 U.S.C. §1257(3). The Municipal Court of Akron on June 20, 1983, suppressed the evidence in this case finding that it was illegally seized under the Fourth Amendment. The decision was reversed by the Court of Appeals for the Ninth Judicial District on August 8, 1984. The Supreme Court of Ohio reversed the Court of Appeals' decision on August 9, 1985. Petitioner prays that this Court grant the Writ of Certiorari for the reason that the Supreme Court of Ohio in the instant case has incorrectly decided important federal questions that must be settled by this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions Involved

U.S. Const., Amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes Involved

O.R.C. §2915.02 Gambling

O.R.C. 4301.10 Powers and Duties of Department of

Liquor Control

O.R.C. §4301.66 Obstructing Search of Premises Prohibited

Regulations Involved

Ohio Administrative Code §4301:1-1-53

STATEMENT OF THE CASE

The following facts were stipulated to by the parties. On May 28, 1982, Detective E. L. Maurer and Lt. Newman of the Summit County Sheriff's Department, both dressed in plain clothes and operating an unmarked car, went to Akron Airport Post 8975, Veterans of Foreign Wars (hereinafter called "Post"). The Post is considered a private club and is not open to the general public, and entry to this Post is reserved for those who possess a key card which fits the entrance door.

After arriving at the parking lot of the Post, the officers parked and waited for someone to arrive and enter said Post so that they could gain entrance by following the "key card" person through the door. At approximately 11:45 p.m., two (2) members, Fraser and McLaughlin, arrived at the Post. As they came up toward the door, Detective Maurer and Lt. Newman walked up behind them. When Mr. Fraser opened the door with his key card, one of the

sheriffs stepped, forward, showed his badge, and identified himself as the sheriff. The two officers continued walking at a rapid pace past Fraser and McLaughlin into the establishment, and as the sheriffs were doing so, he asked to see the manager. While Newman was talking to the barmaid, Maurer was inspecting the "Castle" video machines. Maurer then went up to the bar, displayed his badge as a sheriff deputy, and announced that, "I am confiscating your machines".

Neither Detective Maurer nor Lt. Newman had a search warrant to enter this private Post. In addition, they were not accompanied by any other persons, such as representatives from the Department of Liquor Control, (hereinafter referred to as D.L.C.), except other police officers who arrived later. It is evident that while Detective Maurer states he arrived to "inspect the premises", said "inspection" was not one at the behest of, or even the knowledge or permission of the D.L.C., but was solely as a county police officer, to search for evidence of criminal code violations, or liquor law violations.

Subsequent thereto, the instant action was brought, charging Defendant with a violation of the Criminal Code, specifically 2915.02. Upon motion to suppress evidence, the trial court issued a suppression order which gave rise to this

appeal.

Upon a Motion to Suppress by the Defendant, the Honorable Trial Court suppressed the evidence obtained on the basis that it was seized in violation of Defendant's rights under the Ohio and U.S. Constitutions.

The Ninth District Court of Appeals reversed the suppression, however, holding, that Defendant did not have a reasonable expectation of privacy in the permit premises, and that the police officers were entitled to execute this search without a warrant under the authority of R.C. §§4301.10 and 4301.66.

On August 9, 1985, the Ohio Supreme Court reversed the Court of Appeals holding that suppression is mandated where law enforcement officers conduct an inspection pursuant to O.R.C. 4301.10 but are not specifically authorized as being within the class of officers to conduct such inspections.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD DETERMINE THE ADMISSIBILITY OF EVIDENCE OBTAINED IN AN INSPECTION OF A STATE REGULATED INDUSTRY WHERE THE INSPECTION HAS NOT EXCEEDED THAT AUTHORIZED BY LAW BUT HAS BEEN CONDUCTED BY LAW ENFORCEMENT OFFICIALS OTHER THAN THOSE SPECIFIED BY STATUTE.

In deciding this case below, the Supreme Court of Ohio held first that an administrative search which has as its purpose the discovery and seizure of gambling contraband is violative of the Fourth Amendment rights. Second, the Supreme Court of Ohio held that the statutes authorizing such administrative searches do not extend to sheriff deputies, and therefore, the evidence resulting from the search mandates exclusion.

The first part of the decision is in conflict with this Court's decision in United States v. Biswell, 406 U.S. 311 (1972).

Warrantless regulatory inspections are not violative of Fourth Amendment protection in certain carefully defined classes of cases. Camara v. Municipal Court, 387 U.S. 523 (1967), Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), United States v. Biswell, 406 U.S. 311 (1972), Marshall v. Barlows, 436 U.S. 307 (1978). It is equally clear that the industry regulated by Title 43 of the Ohio Revised Code, i.e., the manufacture, sale, and distribution of alcohol, falls within one of these defined classes of cases. Colonnade Catering Corp. v. United States, supra. In order to pass constitutional muster, such inspection must be reasonably conducted in scope and manner to legitimate

interests of the regulated industry and infringe minimally on justifiable expectations of privacy. In that regard, Justice White stated in United States v. Biswell, supra, 316:

> It is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment. In See v. City of Seattle, 387 U.S. 541 (1967), the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short time... Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.
>
> It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.

As recognized in Biswell, the reasonableness of the manner of inspection permissible is dependent upon the activity regulated. One who is engaged in the licensed activity of selling liquor, like his Biswell counterpart in the licensed activity of selling firearms, cannot justifiably have an expectation of privacy from"effective inspections". United States v. Biswell, supra, at 316.

It is clear that an inspection pursuant to statutory regulation may result in a criminal prosecution when such inspection produces evidence of criminal activity. See United States v. Biswell, supra, where the conviction of a pawnshop owner was upheld on a charge arising from the seizure of two sawed-off shotguns by a treasury agent who, without warrant or prior notice, inspected the premises pursuant to statute and found the guns.

Possession of a gambling device is a violation of Ohio Law in two respects. First, such possession is violative of Section 4301:1-1-53 of the Ohio Administrative Code:

> Section II.
>
> No person authorized to sell alcoholic beverages shall have, harbor, keep, exhibit, possess, or employ or allow to be kept, exhibited, or used in, upon or about the premises of the permit holder of any device, machine, apparatus, book, record, forms, tickets, papers or charts which may or can be used for gaming or wagering or

the recording of wagers, pools, or chances on the result of any contest, or allow or conduct gaming or wagering on such premises on any game of skill or chance.

Second, such possession constitutes a violation of Ohio Revised Code Section 2915.02(A)(5):

> Section 2915.02 Gambling.
> (A) No person shall

***

(5) With purpose to violate Division (A)(1),(2),(3), or (4) of this section, acquire, possess, control, or operate any gambling device.

In that possession of a gambling device is a violation within the scope of a properly conducted administrative search, there is no violation of any reasonable expectation of privacy protected by the Fourth Amendment, nor is a resulting prosecution for such possession such a violation.

As to the second part of the decision of the Supreme Court of Ohio, the apparent lack of statutory authority does not mandate exclusion. An analogous case is that of Kettering v. Hollen, 64 Ohio St. 2d 232 (1980). In that case, a police officer made an arrest having probable cause but without specific statutory authority. The Court stated there that while such arrest was unauthorized, the violation of the statute by the officer did not rise to constitutional levels so as to mandate suppression.

In the present case, the detective, while objectively acting under color of Chapter 4301 of the Ohio Revised Code, conducted an otherwise reasonable regulatory inspection. The Supreme Court of Ohio has determined that such inspection was unauthorized, not because of the inspection's scope, but because of the personnel involved. Suppression under these

circumstances would serve no legitimate purpose by punishing the objectively reasonable behavior of the detectives, but would only act as an unjustified windfall to the Appellant. See United States v. Leon, 104 Supreme Court Reporter 3405 (1984).

CONCLUSION

This case presents a novel issue of law concerning the admissibility of evidence obtained through an inspection authorized by statute but conducted by officers later determined not to be authorized to conduct such inspections. Insofar as the inspection in question was conducted within the scope of state regulation and statute, no reasonable expectation of privacy was violated. The officers' actions in no way warrants the extraordinary remedy of exclusion of the evidence obtained. The State therefore, requests this Court grant a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided August 9, 1985)

No. 84-1529

THE SUPREME COURT OF THE STATE OF OHIO

The State of Ohio, City of Columbus

THE STATE OF OHIO,

Appellee

vs.

AKRON AIRPORT POST NO. 8975;
VETERANS OF FOREIGN WARS OF
THE UNITED STATES

Appellant

Liquor Control - R.C. 4301.10 does not empower law-enforcement officers who are not liquor department agents or employees to search liquor permittee's premises, when.

R.C. 4310.10, which in subdivision(A)(7) grants powers to the Department of Liquor Control to "[d]elegate to any

of its agents or employees any power of investigation which the department possess *** with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor, ***" does not empower law-enforcement officers who are not liquor department agents or employees to enter and search a liquor permitee's premises for "evidence of general criminality" with the intent to charge the permitee with any violations contained in R.C. Title 29.

(No. 84-1529-Decided August 9, 1985.)

Appeal from the Court of Appeals for Summit County

The appellant, Akron Airport Post No. 8975, Veterans of Foreign Wars of the United States (hereinafter "VFW Post"), was charged by the Summit County Sheriff's Department with a violation of R.C. 2915.02, Gambling. The Akron Municipal Court granted the appellant's motion to suppress evidence. This evidence consisted of video machines which the sheriff's department had confiscated. Thereafter, the Court of Appeals for Summit County reversed the decision of the Akron Municipal Court which has suppressed this evidence.

The facts of this case were stipulated to by the parties.

The appellant is a private club possessing a liquor

permit issued by the Ohio Department of Liquor Control. Entry to the VFW Post is limited to those persons in possession of a key card which opens the entrance door.

On May 28, 1982, two detectives of the Summit County Sheriff's Department went to the VFW Post to wait for someone with a key card to open the door and thereby entry with the key-card holder. The detectives were dressed in plain clothes and drove an unmarked vehicle. At about 11:45 p.m. on that date, two members of the VFW Post arrived, approached, and opened the entrance door. As they did so, the detectives also approached, identified themselves, and entered the VFW Post by passing the two members.

Upon being informed that the manager was not present, one detective spoke to the barmaid and the other detective inspected a video machine. The latter then identified himself and announced that he was confiscating the video machines of the appellant.

Neither detective possessed a key card for entry to the VFW Post nor had either obtained a search warrant. Further, neither detective was accompanied by an agent of the Department of Liquor Control nor was entry made at the request of, with the permission of, or knowledge of, the

Department of Liquor Control.

Finally, the detectives entered the premises of the VFW Post solely as county law enforcement officers to search for evidence of violations of the Criminal Code or violations of the liquor laws.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Harold K. Stubbs, director of law, Gary M. Rosen, city prosecutor, and Charles R. Quinn, for appellee.

Dworken & Bernstein Co., L.P.A., Howard W. Bernstein and Patrick J. Perotti, for appellant.

Climaco, Climaco, Seminatore & Lefkowitz Co., L.P.A., and Mark R. DeVan, urging reversal for amici curiae, Ohio Licensed Beverage Assn. et al.

DAHLING, J. Appellant has submitted two propositions of law relative to its argument that the court of appeals erred in reversing the judgment of the trial court which granted appellant's motion to suppress.

These propositions are: (1) that under the facts of the instant case a search warrant was required; and (2) that R.C. 4301.10 does not allow a law enforcement officer, who does not have express authority from the Department of Liquor Control to conduct a search as the one conducted herein.

Both propositions are with merit and are sustained.

Where there is no search warrant, the burden falls on the state to show that a search comes within one of the judicially recognized exceptions:

(a) A search incident to a lawful arrest;

(b) Consent signifying waiver of constitutional rights;

(c) the stop-and-frisk doctrine;

(d) hot pursuit;

(e) probable cause to search, and the presence of exigent circumstances; or

(f) the plain-view doctrine.

In the case of Carter v. State (Fla. App. 1970), 238 So. 2d 681, the defendant was convicted of receiving stolen property, cases of stolen cigaretts, which law-enforcement officers, accompanied by a state beverage agent, recovered from the defendant's grocery store at a time when it was closed. The officers and the agent, after receiving a tip, entered the store with the owner, but without a search warrant, and sought to justify the search on the basis of the state's Beverage Law. On appeal, the appellate court rejected the state's contentions, holding at 683 that:

"* * * [T] he authority of a beverage agent to

> "search the premises of a beverage licensee without a search warrant is restricted to occasions in which the beverage agent is acting in good faith 'in the enforcement of the beverage law and the cigarette tax law of this state, and in the prosecution of offenders against such laws.'"

See, also, Finn's Liquor Shop, Inc. v. State Liquor Auth. (1969), 24 N.Y. 2d 647, 658, 249 N.E. 2d 440, 445, where the court of appeals, ruling on a search without a warrant, comments:

> "***No State may require, as a condition of doing business, a blanket submission to warrantless searches at any time and for any purpose***"

Special attention is directed to the case of State v. Williams (1980), 84 N.J. 217, 417 A. 2d 1046, where detectives of the local police, without assistance from or authorization by the Division of Alcoholic Beverage Control ("ABC"), on a tip, and without a search warrant, entered a tavern which had been issued an ABC license, identified themselves to the bartender as police, and proceeded to search for a "stolen C.B. radio." While thus searching, they found lottery gambling material and revolvers. Defendant Williams was charged and convicted of possession of lottery materials, working for a lottery, and possession of revolvers without a permit; the trial court refused to grant his motion to suppress.

On Appeal to the Superior Court Appellate Division, Williams' conviction was reversed and, on appeal by the state, the New Jersey Supreme Court affirmed the reversal by the appellate court.

The following well documented observations by the New Jersey Supreme Court are noteworthy and persuasive:

> "The State argues that the statute authorizes warrantless searches in the enforcement of the alcoholic beverage control laws, and that enforcement includes the investigation of crimes by local police without express authorization by State or local ABC boards." Id. at 223.
>
> "*** We reject as unsound the notion that persons doing business in a strictly regulated industry such as the liquor business waive their Fourth Amendment rights. See. 2 LaFave, **Search and Seizure,** Section 10.2 at 237-238 (1978), ***." Id. at 225.
>
> "*** Here, the conduct constituted a warrantless search by local detectives for evidence of a crime. N.J.S.A. 33:1-35 authorizes the Director of the Division of ABC and local ABC boards to investigate licensed taverns. In this case, the persons who made the search were not agents of either the State or a municipal ABC board. They were policemen, and they were looking for a stolen C.B. radio. As disclosed at the suppression hearing, for two days the officers had known about the stolen radio. Without either a warrant or authorization, they searched a tavern. There was no reason for them not to obtain either a warrant or an authorization. They obtained neither. A local law enforcement officer who relies on the ABC laws for authority to make a warrantless search must be authorized

expressly to conduct that search. The search was invalid. See Biswell, supra, 406 U.S. at 315 ***." Id.

"We conclude there is no statutory authority for a warrantless search of a tavern by local law enforcement officers conducting their own investigation of a crime without specific authorization. Further we conclude that the issuing authority in this case, the Paterson Alcoholic Beverage Control Board, had not authorized the search and that the police officers were not making an investigation while enforcing ABC laws." Id. at 226.

"To conclude, the Fourth Amendment of the United States Constitution generally prohibits a search undertaken without a valid warrant. An exception permits warrantless searches for offenses peculiar to the liquor business, when authorized by statute. N.J.S.A. 33:1-35does not allow searches by local law enforcement officers conducting criminal investigation without specific authorization." Id. at 227.

We conclude that under the federal and Ohio Constitutional standards, the search herein, having been conducted without a search warrant, was unreasonable and violated apppellant's rights.

Appellant's second proposition of law is that R.C. 4301.10 does not allow a law-enforcement officer, who does not have express authority from the Department of Liquor Control, to conduct a search as the one conducted herein.

R.C. 4301.10 provides in part:

"(A) The department of liquor control shall:

" ***

"(6) Inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301 and 4303 of the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol;

"(7) Delegate to any of its agents or employees any power of investigation which the department possesses and the powers of the police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor***." (Emphasis added.)

In construing the scope of R.C. 4301.10, the courts have regularly held it to allow inspection by the Department of Liquor Control, as well as by its authorized agents. In Solomon v. Liquor Control Comm. (1965), 4 Ohio St. 2d 31, 35 [33 O.O.2d 339] the Supreme Court stated:

"*** [T]he terms of the statute quoted above [R.C. 4301.10] are sufficently broad and comprehensive to allow agents of the Department to enter the business premises of a permit holder to determine whether in the operation of his business he is complying with the laws and regulations governing that business.***"

In State, ex rel. Argonne Post No. 545 v. Bd. of Liquor Control (1953), 131 N.E.2d 245, 254, the Court of Appeals for Franklin County adopted the analysis of the trial judge, holding:

"Anyone granted a permit is subject to all the

> Department's regulations which are applicable to him and an inspection of the permit premises without a search warrant is not a violation of any of his constitutional rights. The moment he becomes a permit holder his permit premises are no longer private and the law against search without warrant has no application with respect to investigations *** [by] the Liquor Department.'"

Likewise, the court in Broadway Enterprise, Inc. v. Bd. of Liquor Control (1964), 1 Ohio App. 2d 470, 477 [30 O.O.2dd 455], quotes 31 Ohio Jurisprudence 2d 290, Intoxicating Liquors, Section 258, with approval for the right of warrantless inspection by Department of Liquor Control personnel:

> "'***A liquor permittee's premises are available for inspection without a search warrant, since the law against search without warrants has no application with respect to investigations of the liquor department.'"

These cases do not allow or suggest that non-delegated persons are permitted to conduct the inspections.

To summarize the facts in the case sub judice, the state admits that these detectives were not Department of Liquor Control agents, and were not acting with any liquor department knowledge or authorization. Further, these detectives were not concluding a limited inspection for Liquor Act violations, but were searching for "evidence of general criminality," with the intent to charge any violations found under R.C. Title 29. Under these facts, we conclude that the actions herein were not within the limited

scope of R.C. 4301.10, and did not comprise an authorized liquor inspection. As such, they constituted an unauthorized search and seizure in violation of the VFW Post's constitutional and statutory rights.

R.C. 4301.10, which in subdivision (A)(7) grants powers to the Department of Liquor Control to '[d]elegate to any of its agents or employees any power of investigation which the Department possesses *** with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor, ***" does not empower law enforcement officers who are not liquor department agents or employees to enter and search a liquor permittee's premises for "evidence of general criminality" with the intent to charge the permittee with any violations contained in R.C. Title 29.

The judgment of the court of appeals is reversed and the judgment of the Akron Municipal Court granting the motion to suppress is reinstated.

Judgment Reversed

CELEBREZZE, C.J. LOCHER, HOLMES, C. BROWN AND DOUGLAS, JJ., concur.

WRIGHT, J., concurs in judgment only.

DAHLING, J., of The Eleventh Appellate District, sitting for SWEENEY, J.

DECISION AND JOURNAL ENTRY OF THE NINTH JUDICIAL DISTRICT COURT OF APPEALS, SUMMIT COUNTY, OHIO

(Dated August 9, 1984)

C.A. No. 11236

IN THE COURT OF APPEALS

NINTH JUDICIAL DISTRICT

STATE OF OHIO)

)SS:

COUNTY OF SUMMIT)

STATE OF OHIO

Plaintiff-Appellant,

v.

AKRON AIRPORT POST 8975;

VETERANS OF FOREIGN WARS

OF THE UNITED STATES,

Defendant-Appellee

DECISION AND JOURNAL ENTRY

R.C. 2915.02

COOK, J.

On May 28, 1982, two officers of the Summit County

Sheriff's Department, Detective Maurer and Lieutenant Newman, while in plain clothes and operating an unmarked car, went to Akron Airport Post 8975, Veterans of Foreign Wars and parked in the Post's parking lot. They waited for someone to arrive and enter the Post using his "key card", so they could follow him through the door. Two members of the Post, Fraser and McLaughlin, approached the door at approximately 11:45 p.m. One of the two officers identified himself to Fraser as a member of the sheriff's department and the two officers followed the two members into the Post. Once inside, the officers asked to see the manager and were told he was absent. Newman started talking to a barmaid and Maurer proceeded to inspect the "Castle" video machines. Maurer then announced that he was confiscating the machines, flashing his deputy sheriff's badge at the time.

In addition to stipulating the above facts, the parties stipulated that the officers had no search warrants, were not accompanied by a representative of the Department of Liquor Control, entry of the Post was not made at the request of the Department of Liquor Control, and that entrance was made solely as county police officers to search for evidence of violations of the criminal code or liquor laws. The Post was charged with "unlawfully and

knowingly possessing a gambling device, to-wit: Two (2) "Castle" electronic video games" in violation of R.C. 2915.02.

On October 29, 1982, appellee filed a motion to suppress the evidence against it, to wit: the two "Castle" video machines. Appellee argued the police officers could not enter and search appellee's premises without a search warrant. It further argued the officers derived no statutory authority to make a warrantless search from R.C. 4301.10 since, at the time of their entrance of the Post, they were not acting as agents of the Department of Liquor Control inspecting for violations of the liquor laws, as required by the statute. Appellant argued that the police officers' warrantless search of appellee's permit premises was as agents of the Department of Liquor Control and permitted by R.C. 4301.66 and that the officers could search for violations of the criminal code as well as violations of the liquor laws.

The trial court granted appellee's motion to suppress on June 20, 1983. The court held that the officers were exempted from the requirement that they have a search warrant to enter appellee's premises only if they were agents of the Department of Liquor Control searching for violations of the liquor laws and, in this instance, they were

not such agents. Therefore, the court concluded their search was invalid and the "Castle" video machines should be suppressed.

Appellant, the State of Ohio, has appealed the judgment of the trial court and has filed the following assignment of error:

"The trial court erred in granting the Defendant's motion to suppress the State's evidence obtained during a search of Defendant's premises, as the officers had authority to search pursuant to the provisions of Revised Code sections 4301.10 and 4301.66 and applicable case law."

The assigned error is well taken.

The laws of Ohio pertaining to liquor are set forth in Title 43 of the Ohio Revised Code. Title 43 consists of seven chapters. Chapter 4301, Liquor Control Law, provides, among other things, for a liquor control commission which has the power to adopt and promulgate rules and orders to carry out Chapter 4301, Liquor Control Law, and Chapter 4303, Liquor Permits. Said Chapter also provides for a department of liquor control and a director for the department, his power to adopt and promulgate certain rules and the department's duty to "enforce Chapters 4301 and 4303 of the Revised Code, and

the rules and orders of the board, the director, and the penal laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquors.***" The seven chapters contain numerous penal laws relating to liquor, including the sale of beer and intoxicating liquor by permit holders.

Due to the history of government regulation of the liquor industry, the holder of a liquor permit has no reasonable expectation of privacy in the permit premises as to reasonable and lawful conditions imposed by statute and rule pertaining to the sale of beer and intoxicating liquor. Marshall v. Barlow's, Inc. (1978), 436 U.S. 307; Solomon v. Liquor Control (1965), 4 Ohio St. 2d 31.

In United States v. Jacobson (1984), 52 L.W. 4414, the United States Supreme Court stated, "*** A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed***"

The Department of Liquor Control has the power, pursuant to R.C. 4301.10 (A) (4) to enforce Chapters 4301 and 4303 of the Revised Code and the rules and orders of the commission, the director, and the penal laws relating to the sale of beer and intoxicating liquors. Police have the power

to enforce the penal laws relating to beer and intoxicating liquor.

Since a permit holder has no expectation of privacy in his permit premises, as far as the statutes and rules governing the sale of beer and intoxicating liquor is concerned, we conclude police may enter said premises without a warrant to inspect for violations of penal laws pertaining to the sale of beer and intoxicating liquor.

Such a conclusion is fortified by R.C. 4301.66 which provides:

> "No person shall hinder or obstruct any agent or employee of the department of liquor control, or any officer of the law, from making inspection or search of any place, other than a bona fide private residence, where beer or intoxicating liquor is possessed, kept, sold, or given away."

In the instant cause, according to the stipulated facts, the "Castle" video machines were visible to the police officers, as well as the others present in appellee's establishment. The officers did not conduct a "search" of the premises for the machines but merely "inspected" them. Believing them to be unlawful and possession of them a crime, the officers confiscated the machines.

Since the officers needed no warrant to inspect or search the permit premises for possible violations of the

the liquor penal laws and, while doing so, had probable cause to believe a crime was being committed in their presence, their confiscation of the machines violated no constitutional right of appellee.

Since no constitutional right of appellee was violated by the confiscation of the machines, the court below erred in granting appellee's motion to suppress. The exclusionary rule applies to violations of a constitutional nature only, absent a legislative mandate requiring application of the rule in other instances. State v. Unger (1981), 67 Ohio St. 2d 65; Kettering v. Hollen (1980), 64 Ohio St. 2d 232.

Judgment reversed and cause remanded for further proceedings according to law.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit, Akron Municipal Court to carry this judgment into execution, shall issue out to this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall

be file stamped by the Clerk of Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

/s/ Robert E. Cook, of the
The Eleventh Appellate District, sitting by assignment.

QUILLIN, P. J.,

BAIRD, J.,

concur.

(Cook, J., Judge of the Eleventh District Court of Appeals, sitting by assignment pursuant to Article IV, §6(C), Constitution).

RULINGS OF THE AKRON MUNICIPAL COURT

ON DEFENDANT'S MOTIONS

(Filed June 20, 1983)

Case No. 82CRB 5829

IN THE MUNICIPAL COURT OF AKRON

SUMMIT COUNTY, OHIO

STATE OF OHIO

Plaintiff

vs.

VFW POST 8975

Defendant

RULING ON DEFENDANT'S MOTION

Defendant, VFW, Post 8975, stands charged with ". . . unlawfully and knowingly possess a gambling device, to wit: 2 "Castle" electronic video games . . . " in violation of Section 2915.02 of the Ohio Revised Code.

Defendant has timely filed a motion to suppress the evidence herein and both parties have been kind enough to furnish helpful briefs in support of their contentions.

FACTS (Stipulated by Parties)

1. Akron Airport Post 8975 - Veterans of Foreign Wars (hereafter called Post) is located in this Court's jurisdiction, and possesses a liquor permit duly issued by the Ohio Department of Liquor Control.

2. This Post is considered a private club not open to the general public, and entry to this Post is reserved for those who possess a key card which fits the entrance door.

3. On May 28, 1982, Detective E. L. Maurer and Lt. Newman, of the Summit County Sheriff's Department, both dressed in plain clothes and operating an unmarked car, arrived at the parking lot of the Post, parked, and waited for someone to arrive and enter said Post so that they (officers) could gain entrance by following the "key card" person through the door.

4. At about 11:45 p.m. two (2) members, Fraser and McLaughlin, arrived at the Post, and as they approached the door, Fraser opened it with his key card when Maurer or Newman showed Fraser his badge, identified himself as a sheriff and the two officers entered the Post passing Fraser and McLaughlin.

5. These officers requested to see the manager and were informed of his absence, and while Newman was talking to the barmaid, Maurer was inspecting the "Castle"

video machines and then went up to the bar, displayed his badge as a sheriff deputy, and announced that "I am confiscating your machines."

6. That neither Maurer nor Newman had a "key card" to the Post nor had either obtained a search warrant before entering this Post.

7. That neither Maurer nor Newman was accompanied by a representative or agent of the Department of Liquor Control (D.L.C.) and that this entry was not made at the request of, knowledge of, or permission by the D.L.C.

8. That this entry was made ". . . solely as a county police officer to search for evidence of criminal code violations, or liquor law violations. . ."

THE LAW

The State contends that the entry by the officers on this occasion is justified under provisions of Ohio Revised Code 4301.10 and 4301.66.

See Ohio Revised Code Section 4301.10 which provides:

> "(A) The Department of Liquor Control shall:
>
> . . .
>
> "(6) Inspect upon demand the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301. and 4303. of the

> "the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol;
>
> "(7) Delegate to any of its agents or employees any power of investigation which the Department possesses and the powers of police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor, . . ."

In construing the scope of 4301.10 O.R.C. the Ohio courts have consistently allowed warrantless searches of permit premises by the D.L.C., or by police officers acting on its behalf, but only for violations of the liquor laws. See Solomon v. Liquor Control Commission (1965), 4 Ohio St. 2d 31; State ex rel v. Board of Liquor Control (1953) 131 N.E. 2d 245; Broadway Enterprises, Inc. v. Board of Liquor Control, (1964) 1 Ohio App. 2d 470.

A police officer may claim exemption from search warrant requirements when he is inspecting a permit premises at the direction and/or as an agent of the D.L.C., for Liquor Act violations. He may not, however, use this section to justify or validate other searches, not within the scope of the statute, such as a general investigation for criminal conduct under Title 29.

The State also contends that a police officer has a continuing statutory right to inspect liquor premises as an

agent of the D.L.C. by reason of O.R.C. Section 4301.66 providing:

> ". . . No person shall hinder or obstruct any agent or employee or any officer of the law from making an inspection or search of any place, other than a bona fide private residence, where beer or intoxicating liquor is possessed, kept, sold or given away . . ."

This Court would suggest that here "any officer of the law" means an officer acting on authority from the D.L.C. or as its agent or any officer otherwise having a legal right to be on the premises. Further, it would be prudent on the part of a person whose premises are being searched to refrain from obstructing and seek relief from the Court.

Under the above stipulated fact situation, since there was no search warrant, the burden falls on the State to show that this search fell within one of the judicially recognized exceptions:

a. A search incident to a lawful arrest;

b. Consent signifying waiver of Constitutional rights.

c. The stop-and-frisk doctrine.

d. Hot pursuit.

e. Probable cause to search, and the presence of exigent circumstances.

f. The plain-view doctrine.

See Carter v. State of Florida, (1970) 238 S.2d 681, where defendant was convicted of receiving stolen property, some more than seven cases of stolen cigarettes, which officers recovered from defendant's grocery store at a time when it was closed. The officers, after receiving a tip, entered the store without a seach warrant and sought to justify the search on the basis of the State Beverage Law. On appeal, the appellate court rejected the officers' contention holding:

> ". . .the authority of a beverage agent to search the premises of a beverage licensee without a search warrant is restricted to occasions in which the beverage agent is acting in good faith in the enforcement of the beverage law and cigarette tax law of this State, and in the prosecution of offenders against such laws. . . . See also a New York case, Finn's Liquor Shop v. State Liquor Authority, (1969) 24 NY2d 677, 249 N.E.2d 440, where the Court of Appeals ruling on a search without a warrant comments:
>
> ". . . No State may require, as a condition of doing business blanket submission to warrantless searches at any time and for any purpose. . ."

Special attention is directed to the case, State of New Jersey v. Williams, (1980) 417 A.2d 1046, where detectives of the local police, without assistance from or authorization by the Division of Alcoholic Beverage Control (ABC), on a tip, and without a search warrant, went to defendant's place of

business where he held an ABC license, identified themselves to the bartender as police and proceeded to search for a "stolen C.B. radio". While thus searching, they found lottery gambling material and revolvers without permit. Williams was charged and convicted of these crimes, the trial court having refused to grant defendant's motion to suppress.

On appeal to the Superior Court, Appellate Division, Williams' conviction was reversed and, on appeal by the State, the New Jersey Supreme Court affirmed the reversal by the appellate court.

The following well documented observations by the New Jersey Supreme Court are noteworthy and persuasive:

> "The state argues that the statute authorizes warrantless searches in the enforcement of the alcoholic beverages control laws, and that enforcement includes the investigation of crimes by local police without express authorizaton by State or local ABC boards. Page 1049.
>
> ". . .
>
> ". . . We reject as unsound the notion that persons doing business in a strictly regulated industry such as the liquor business waive their Fourth Amendment rights. See 3 LaFave, Search and Seizure, §10.2 at 237-238 (1978) . . . . . Page 1050.
>
> ".. . Here, the conduct constituted a warrantless search by local detectives for evidence of a crime. N.J.S.A. 33:1-35 authorizes the director of the Division of ABC and local ABC boards to investigate licensed taverns. In this case, the

persons who made the search were not agents of either the State or the municipal ABC board. They were policemen, and they were looking for a stolen C.B. radio. As disclosed at the suppression hearing, for two days the officers had known about the stolen radio. Without either a warrant or authorization, they searched a tavern. There was no reason for them not to obtain either a warrant or an authorization. They obtained neither. A local law enforcement officer who relies on the ABC laws for authority to make a warrantless search must be authorized expressly to conduct that search. The search was invalid. See Biswell, supra, 406 U.S. at 315, 92 S. Ct. at 1596, 32 L. Ed.2d at 92. Page 1050.

> ". . .
>
> ". . . We could add there is no statutory authority for a warrantless search of a tavern by local law enforcement officers conducting their own investigation of a crime without specific authorization. Further, we conclude that the issuing authority in this case, the Paterson Alcoholic Beverage Control Board, had not authorized the search and that the police officers were not making an investigation while enforcing ABC laws. Page 1050.
>
> ". . .
>
> "To conclude, the Fourth Amendment to the United States Constitution generally prohibits a search undertaken without a valid warrant. An exception permits warrantless searches for

> offenses peculiar to the liquor business, when authorized by statute. N.J.S.A. 33:1-35 does not allow searches by local law enforcement officers conducting a criminal investigation without specific authorization. Page 1051."

Under the Federal and State Ohio Constitutional standards, this search under consideration is unreasonable and violates Defendant's rights.

Defendant's Motion to Suppress is granted and ordered.

JUDGE JOSEPH D. ROULHAC

ORDER OF THE SUPREME COURT OF OHIO

(Dated August 9, 1985)

No. 84-1529

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,

Appellee

vs.

AKRON AIRPORT POST NO. 8975

VETERANS OF FOREIGN WARS

OF THE UNITED STATES,

Appellant

APPEAL FROM THE COURT OF APPEALS

FOR SUMMIT COUNTY

This cause, here on appeal from the Court of Appeals for Summit County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed and the judgment of the Akron Municipal Court granting the motion to suppress is reinstated for the reasons set forth in the opinion rendered herein.

It is further ordered that appellant recover from the

appellee its costs herein expended; and that a mandate be sent to the Akron Municipal Court to carry this judgment into execution, and that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

MANDATE OF THE SUPREME COURT OF OHIO

TO COURT OF COMMON PLEAS

(Dated August 9, 1985)

No. 84-1529

IN THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,

Appellee

vs.

AKRON AIRPORT POST NO. 8975

VETERANS OF FOREIGN WARS

OF THE UNITED STATES

Appellant

MANDATE

To the Honorable Akron Municipal Court.

Within and for the County of Summit, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals is reversed and the

judgment of the Akron Municipal Court granting the motion to suppress is reinstated for the reasons set forth in the opinion rendered herein.

AMENDMENT TO THE CONSTITUTION

OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(Effective 1791)

OHIO REVISED CODE

Section 2915.02 Gambling.

(A) No person shall:

(1) Engage in bookmaking, or knowingly engage in conduct that facilitates bookmaking;

(2) Establish, promote, or operate, or knowingly engage in conduct that facilitates any scheme or game of

chance conducted for profit;

(3) Knowingly procure, transmit, exchange, or engage in conduct that facilitates the procurement, transmission, or exchange of, information for use in establishing odds or determining winners in connection with bookmaking or with any scheme or game of chance conducted for profit;

(4) Engage in betting or in playing any scheme or game of chance, except a charitable bingo game, as a substantial source of income or livelihood;

(5) With purpose to violate division (A)(1), (2), (3), or (4) of this section, acquire, possess, control, or operate any gambling device.

(B) For purposes of division (A)(1) of this section, a person facilitates bookmaking if he in any way knowingly aids an illegal bookmaking operation, including without limitations placing a bet with a person engaged in or facilitating illegal bookmaking. For purposes of division (A)(2) of this section, a person facilitates a scheme or game of chance conducted for profit if he in any way knowingly aids in the conduct or operation of any such scheme or game, including without limitation playing any such scheme or game.

(C) this section does not prohibit conduct in connection with gambling expressly permitted by law.

(D) This section does not apply to:

(1) Schemes of chance conducted by a charitable organization that is, and has received from the Internal Revenue Service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code, provide that all of the money or assets received from such scheme of chance after deduction only of prizes paid out during the conduct of the scheme of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)91), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code, and provided that the scheme of chance is not conducted during, or within ten hours of a bingo game conducted for amusement purposes only pursuant to section 2915.12 of the Revised Code.

(2) Games of chance, if all of the following apply:

(a) The games of chance are not craps for money,

roulette for money, or slot machines;

(b) The games are conducted by a charitable organization that is, and has received from the Internal Revenue Service a determination letter that is currently in effect, stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code;

(c) The games are conducted at festivals of the organization that are conducted for a period of four consecutive days or less and not more than twice a year, and are conducted on premises owned by the charitable organization for a period of no less than one year immediately preceding the conducting of the games or on premises leased from a governmental unit;

(d) All of the money assets received from these games of chance after deduction only of prizes paid out during the conduct of the games of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax

Code;

(e) The games are not conducted during, or within ten hours of, a bingo game conducted for amusement only pursuant to section 2915.12 of the Revised Code.

No person shall receive any commission, wage, salary, reward, tip, donation, gratuity, or other form of compensation, directly or indirectly, for operating or assisting in the operation of any scheme or game of chance.

(E) Division (D) of this section shall not be construed to authorize the sale, lease, or other temporary or permanent transfer of the right to conduct schemes of chance or games of chance, as granted by division (D) of this section, by any charitable organization that is granted that right.

(F) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender has previously been convicted of any gambling offense, gambling is a felony of the fourth degree.

Section 4301.10 Powers and duties of department of liquor control.

(A) The department of liquor control shall:

(1) Control the traffic in beer and intoxicating liquor in this state, including the manufacture, importation, and

in this state, including the manufacture, importation, and sale thereof;

(2) Grant or refuse permits for the manufacture, distribution, transportation, and sale of beer and intoxicating liquor and the sale of alcohol, as authorized or required by Chapters 4301. and 4303. of the Revised Code; and a certificate signed by the director of liquor control to which is affixed the official seal of the department stating that it appears from the records of the department that no permit has been issued to the person specified therein, or that a permit, if issued, has been revoked, canceled, or suspended shall be received as prima-facie evidence of the facts therein recited in any court, or before any officer of this state;

(3) Put into operation, manage, and control a system of state liquor stores for the sale of spirituous liquor at retail and to holders of permits authorizing the sale of such liquor; however, the department shall not establish any drive-in state liquor stores; and by means of such stores, and such manufacturing plants, distributing and bottling plants, warehouses, and other facilities as it deems expedient, establish and maintain a state monopoly of the distribution of such liquor and its sale in packages or

containers; and for such purpose manufacture, buy, import, possess, and sell spirituous liquors as provided in Chapters 4301. and 4303. of the Revised Code, and in the regulations promulgated by the director of liquor control pursuant to such chapters; lease, or in any manner acquire the use of any land or building required for any such purposes; purchase such equipment as is required; and borrow money to carry on its business, and issue, sign, indorse, and accept notes, checks, and bills of exchange; but all obligations of the department created under authority of this division shall be a charge only upon the moneys received by the department from the sale of spirituous liquor and its other business transactions in connection therewith, and shall not be general obligations of the state;

(4) Enforce Chapters 4301. and 4303. of the Revised Code, and the rules and orders of the board, the director, and the penal laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquors; and the attorney general, any prosecuting attorney, and any prosecuting officer of a municipal corporation or a municipal court, shall at the request of the department prosecute any person charged

with the violation of such chapters or of any section of the Revised Code relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor;

(5) Determine the locations of all state liquor stores and manufacturing, distributing, and bottling plants required in connection therewith, subject to Chapters 4301. and 4303. of the Revised Code;

(6) Inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301. and 4303. of the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol;

(7) Delegate to any of its agents or employees any power of investigation which the department possesses and the powers of police officers with respect to the enforcement of any of the penal laws relating to beer and to intoxicating liquor, provided that except in his report to the department or when called upon to testify in any court or proceeding, no such agent or employee shall divulge any information acquired by him with respect to the transactions or the business of any person while acting as such agent or

employee, and if he does divulge such information he shall be disqualified forever from acting as agent or in any other capacity under the appointment or employment of the department;

Section 4301.66 Obstructing search of premises prohibited.

"No person shall hinder or obstruct any agent or employee of the department of liquor control, or any officer of the law, from making inspection or search of any place, other than a bona fide private residence, where beer or intoxicating liquor is possessed, kept, sold, or given away.

LCc-1-53 Gambling and gambling devices prohibited

Section I.

Conviction in any court of competent jurisdiction of any holder of any permit, or of his agent or employee, or of any person, for keeping, exhibiting for gain, operating gambling devices, or conducting or permitting on such premises any games of chance, shall be grounds for suspension or revocation of such permit or permits.

Section II.

No person authorized to sell alcoholic beverages shall

have, harbor, keep, exhibit, possess or employ or allow to be kept, exhibited or used in, upon or about the premises of the permit holder of any device, machine, apparatus, book, record, forms, tickets, papers or charts which may or can be used for gaming or wagering or the recording of wagers, pools or chances or the result of any contest, or allow or conduct gaming or wagering or such premises on any game of skill or chance.

Section III

This regulation does not apply to the selling of lottery tickets authorized and issued by the Ohio State Lottery Commission and as provided in Section 4301.03 of the Ohio Revised Code.